Supreme Court, U.S.
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No._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

Carolina Rodriguez Arbelaez, *et al.*,

Petitioners,

v.

R. Richard Newcomb, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLOMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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45pp

QUESTION PRESENTED

WHETHER SPECIFICALLY LABELED NONRESIDENT ALIENS WITHOUT SUBSTANTIAL CONTACT TO THE UNITED STATES HAVE STANDING TO CHALLENGE THE EXECUTIVE BRANCH'S ISSUANCE OF AN INTERNATIONAL BILL OF PAINS AND PENALTIES IN VIOLATION OF THE LIMITATIONS ON THE FEDERAL GOVERNMENT UNDER ARTICLE I, § 9, CL. 3 OF THE CONSTITUTION?

LIST OF PARTIES

Petitioners include Carolina Rodriguez Arbelaez, Maria Fernanda Rodriguez Arbelaez, Amparo Arbelaez Pardo, Juan Pablo Rodriguez Moreno, Gladys Miriam Ramirez Libreros, Miguel Andres Rodriguez Moreno, Martha Lucia Echeverry Trujillo, Mariella Mondragon, Jaime Rodriguez Mondragon, Ana Dolores Avila De Mondragon, Alicia Mondragon Avila, Juan Carlos Munoz Rodriguez, Maria Alexandra Rodriguez, Humberto Rodriguez Mondragon, Amparo Rodriguez Orujuela, Haydee Rodriguez, Hernan Rojas Mefia, Alfanso Gil Osorio, Jaime Ivan Idarraga Ortiz, Claudia Pilar Rodriguez, and Soraya Munoz Rodriguez (hereinafter the "nonresident alien members of the Rodriguez-Orjuela Family").

Respondents are Mr. R. Richard Newcomb, Director of the Office of Foreign Assets Control, and Messrs. Robert Rubin and Lawrence Summers, former Secretaries of the Department of the Treasury, Mr. Paul O'Neill, current Secretary of the Treasury; Ms. Madeline Albright former Secretary of State, and Mr. Colin L. Powell, current Secretary of State.

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OPINIONS BELOW

The Judgement of the United States Court of Appeal for the District of Columbia Circuit, No. 00-5217 is unpublished, but is reproduced at A-3.[1]

The Order and Memorandum of the United States District Court for the District of Columbia, No. 98cv2813, is unreported, but is reproduced at A-5.

JURISDICTION

The judgment of the Court of Appeals for the District of Colombia Circuit was entered on January 18, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article I, § 9 Cl. 3 ..... A-1

STATEMENT OF THE CASE

A. JURISDICTION BELOW

The District Court's jurisdiction was based on 28 U.S.C. §§ 1331 and 1355. Appellate jurisdiction was invoked pursuant to 28 U.S.C. § 1291.

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[1](A-) references are to pages in the Appendix.

B. RELEVANT FACTS

From 1987 to 1994, in the Republic of Colombia, the Government of the United States exerted pressure and made *de facto* presentation of evidence during *in rem* forfeiture litigation there involving the property of members of the Rodriguez-Orjuela Family (See List of Parties above). Despite this opportunity to be heard and the direct involvement of the Government of the United States in the judicial process in the Republic of Colombia, the Courts there held that no credible evidence was presented to support any finding that any of the members of Rodriguez-Orjuela Family were involved in money laundering activity or were "frontmen" for the Cali Cartel.

In total disregard of the above judicial finding and decisions, Mr. R. Richard Newcomb, as Director of the Office of Foreign Assets Control (hereinafter "OFAC"), under the Secretary of the Department of Treasury, issued two administrative orders on October 24, 1995 and March 8, 1996 (hereinafter "Notice of Blocking"), pursuant to delegated authority from Congress.[2] The Notice of Blocking designated only the

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On October 21, 1995, Executive Order #12978, was issued by former President Bill Clinton, under delegated authority from Congress pursuant to the International Emergency Economic Powers Act 50 U.S.C. § 1701 et seq. (hereinafter "IEEPA"). This Executive Order specifically named as "Principal Individuals," the five leaders of the Cali Drug Cartel, including the brothers

nonresident alien members of the Rodriguez-Orjuela Family, ages 4 to 87 years old, based on their blood relationship to the Rodriguez-Orjuela Brothers, and their being nonresident aliens. The U.S. citizen members of the Rodriguez-Orjuela Family, were amended off the Notice of Blocking.

The Notice of Blocking labeled each nonresident alien member of the Rodriguez-Orjuela Family as a Specially Designated Narcotics Traffickers (hereinafter "SDNTs"). The Notices of Blocking were distributed worldwide, and ordered the blocking and seizing of all property and interests in property in the United States, and prohibited any and all transactions or dealings with any SDNTs by anyone in the United States, or anyone outside the United States with connection to the United States. Furthermore, the SDNTs visas to enter the United States were canceled based only on the Notice of Blocking.

Thus due to the published worldwide threats by the Government of the United States there was an international stigma in the label SDNTs that caused the "Civil Death" of the nonresident alien members of the Rodriguez-Orjuela Family because they loss the right to acquire or transfer their property, the right to contract

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Gilberto and Miguel Rodriguez-Orjuela (hereinafter "Rodriguez-Orjuela Bothers"), and seized all their assets worldwide. This action was done without either compliance with the provisions of federal forfeiture law or any judicial hearing.

and employment, the right to conduct their business, the right to obtain life, medical, or car insurance, the right to travel internationally,[3] the right to conduct business with financial institutions, i.e. to have checking, saving, credit card, and/or stock market accounts.[4]

The Complaint sought judicial review and a declaratory judgement voiding the Notice of Blocking and the denial of visas as the violation of the limitation in the Constitutional prohibiting the issuance of a bill of pains and penalties, and thereby circumventing the restrictions of 50 U.S. C. §1701(b) and §1705, and the requirements 21 U.S.C. §881(a)(6).

After oral argument, the District Court granted the Government's motion for Summary Judgement, holding that foreign nationals and entities without any connection to the United States lack standing to bring a challenge under Article I, Section 9, clause 3 of the Constitution of the United States; and held that if these

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Foreign countries regard having or not having a United States entry visa, as the basis for granting or denying their visa. Thus the cancellation stamp on a United States visa in a Passport is a stigma.

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OFAC specifically directed all foreign entity or individual with connection to the United States as being under the jurisdiction of the Notice of Blocking, and thus prohibited from conducting any business with any SDNTs i.e. corresponding banks, financial institutions, any subsidiaries of U.S. entities etc.

nonresident aliens had substantial economic interest in the United States, they could have sought the protection of the Constitution.[5] The District Court did not address the circumvention of the "innocent owner's defense" under 21 U.S.C. § 881, or violation of 50 U.S.C. § 1701 and §1705.

The Court of Appeals affirmed the district court's order, holding that the nonresident alien members of the Rodriguez-Orjuela Family as,

> . . . foreign nationals without a substantial connection to the United States; they therefore lack standing to bring a challenge under Article I, Section 9, clause 3 of the Constitution of the United States. *See United States v. Verdugo-Urguidez* (citation omitted) ("[Aliens receive Constitutional protections [only] when they have come within the territory of the United States and developed substantial connections with this country."); *People's Moiahedin Organization v. Dept. of State* (citation omitted)("A foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.").(A-3)

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[5]The undersigned argued that Colombian Court decisions were *res judicata*, and that OFAC has no legal authority to either issue the Notice of Blocking, or conduct any administrative proceeding in support of a bill of pains and penalties.

REASONS FOR GRANTING THE WRIT

This writ must be granted because the Court of Appeals has decided an important Constitutional question in direct conflict with this Court's prior decisions, by holding that nonresident aliens, without substantial economic interest in the United State, have no standing to challenge the actions of the Executive Branch when it acts internationally in violation of the limitations of Article I, § 9, cl. 3 of the Constitution.

I. ALL SPECIFICALLY DESIGNATED NONRESIDENT ALIENS HAVE STANDING TO CHALLENGE THE EXECUTIVE BRANCH'S INTERNATIONAL ISSUANCE OF A BILL OF PAINS AND PENALTIES IN VIOLATION OF THE LIMITATION OF ARTICLE I, § 9, CL. 3 OF THE CONSTITUTION.

The Complaint did not involve what protections, if any, are given to nonresident aliens under the Bill of Rights. Therefore the holding of this Court in *United States v. Verdugo-Urquides*, 494 U.S. 259, 110 S.Ct. 1056, 108 L.Ed2d 222 (1990), and the holding of the Court of Appeals of the District of Columbia in *Peoples Majahedin Organization of Iran v. Department of State*, 182 F.3d 17 (D.C. Cir. 1999), are not on point since the issue in those cases were challenges under the Bill of Rights by nonresident aliens to the actions of the Executive Branch outside of the United States.

Here the nonresident alien members of the Rodriguez-Orjuela Family challenge Executive Branch's international actions based on the limitation in Article I, §9, Cl.3, of the Constitution.

During oral argument before the District Court, the undersigned counsel argued that,

> . . . [w]e 're not raising–[as] the administration, [and the] lawyers for the Government, keep trying to pull [the issue] into the Bill of Rights. I'm not [arguing] the Bill of Rights. I've said continuously [argued] **we're dealing with [violations of the] fundamental prohibitions on Government to act [outside its Constitutional authority]**" (Transcript of hearing of December 16, 1999, page 19, lines 20 to 24) (Emphasis added).

A. OFAC'S Notice of Blocking is a prohibited bill of pains and penalties.

In the instant action we have OFAC issuing the Notice of Blocking, pursuant to the Executive Order issued under delegated authority of Congress under the Commerce Clause (A-1). The Notice of Blocking intentionally circumvented the rights of the "innocent owner's defense," under 21 U.S.C. §881(a)(6), by ignoring the restriction of 50 U.S. C. §1701(b). Thus OFAC was able to seize, and effectively forfeited the property rights of the nonresident alien members of the

Rodriguez-Orjuela Family, and cause their "Civil Death"[6] internationally by declaring them SDNTs.

Regarding Bills of Attainder and bills of pains and penalties,[7] the Court of Appeals for the District of Columbia Circuit has held that the prohibition is triggered if the "legislative act meets two tests-first, that it applies with specificity, and second that it imposes punishment." *Bellsouth Corp. v. FCC*, 144 F.3rd 58 at 62 (D.C. Cir. 1998). The limitation in the constitution applies to the Executive Branch when acting under delegated authority from Congress, *Dehainaut v. Pena*, 32 F.3rd 1066 at 1071 (7th Cir. 1994)(See discussion p. 18 below).

1. As to the first test, "specificity," it is obvious that the Notices of Blocking specifically labeled as SDNTs only the nonresident alien members of the

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Blacks's Law Dictionary, 6th Edition, at p. 245, defines "Civil death," as the state of a person who, though possessing natural life, has lost all civil rights and as to them is considered civilly dead. (Citation omitted)

7

A bill of pains and penalties is a Bill of Attainder imposing punishment less than death. Such bills are within the constitutional prohibitions against Bills of Attainder. Both are legislative actions that inflict punishment without judicial trial. *Nixon v. Administrator of General Services*, 408 F.Supp 321 at 371 (DC 1976, aff'd 97 S.Ct. 2777, 433 U.S. 425, 53 L.Ed.2d 867(1977).

Rodriguez-Orjuela Family ranging from ages 16 to 87 years old.

This should have been enough to trigger the voiding of the Notice of Blocking, since they stigmatized worldwide the nonresident alien members of the Rodriguez-Orjuela family by labeling them with the badge of infamy of SDNTs without a judicial trial, to avoid the "innocent owner's defense" under 21 U.S.C. §881(a)(6). This Court has held that laws imposing civil disabilities, such as the penalty of "infamy" or being "stigmatized," without judicial trial, are punishment and a prohibited bill of attainder, *U.S. v. Lovett*, 66 S.Ct. 1073 at 1078, 328 U.S. 303, 90 L.Ed. 1252 (1946); *United States Ex Rel. Martin v. Strasburg*, 513 F.Supp 691 at 715 and 716 (1981).

2. As to the second test, there are three distinct punishment inquiries under, *Bellsouth Corp.* 144 F.3d at 64:

i. "Corruption of Blood"

Under common law there did exist forfeiture based on the conviction of a felony or of treason. Such a forfeiture was known as forfeiture of estate state or corruption of blood.[8]

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[8]". . . is defined to be the stain or corruption of the blood . . . ; a mark of infamy by which the offender becomes . . .

The Courts have held that this sanction, which is the bar on an individual's receiving or transmitting property constitutes punishment, and is prohibited by the Constitution. *Bellsouth*, 144 F.3d at 64; *Ex part Garland*, 71 U.S. 333, 18 L.Ed. 366 (1867).

This is exactly what has occurred to the nonresident members of the Rodriguez-Orjuela Family labeled as SDNTs. OFAC has used the badge of infamy of SDNTs, to cause their "Civil Death" internationally, and thereby make "end run" around the "innocent owner's defense" under 21 U.S.C. §881(a)(6).

ii. Deprivation of Property and the Right to Contract or to Employment.

> ....Even if regarded as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty, and property." *Downs v. Bidwell*, 21 S.Ct. at 785.

The SDNTs badge of infamy has deprived internationally each nonresident alien member of the Rodriguez-Orjuela Family of their right to their property, the right to transfer property, the right to conduct business and to employment, the right to buy goods, and the right to use the service of financial institutions. This

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'blackened' [footnote omitted], the singling out of an individual for legislatively prescribed punishment [footnote omitted]." 7 C.J.S. Attainder at 774.

despite judicial decision in the Courts of Colombia finding them cleared of any dealing with the Rodriguez-Orjuela Brothers.

The SDNTs label is "punishment," under all of the elements this Court defined in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 at 168-169, 83 S.Ct 554, 9 L.Ed2d 644 (1963). It was issued to stigmatize their reputations, and to impair their right to earn a living. This clearly punishes the individuals without a judicial trial, which is forbidden by the Constitution. *Lovett*, 66 S.Ct. at 1078.

iii. OFAC's Notice of Blocking serves only a punitive legislative purpose.

OFAC's Notice of Blocking, and State's cancellation of visas were punitive reaction to the findings and decisions of the Colombian Courts.

The Courts in reviewing challenges to the Executive Branch actions, have held that the Executive Branch must comply with the guidelines Congress enacted in legislation, *Youngstown Sheet & Tube Co. v Sawyer*, 343 U.S. 614 at 637-38, 72 S.Ct. 863 (1952).

Thus the fact that OFAC "stigmatized" each member of the nonresident alien members of the Rodriguez-Orjuela Family as SDNTs, to circumvent the "innocent owner's defense" of 21 U.S.C. §881(a)(6), establishes a punitive purpose. This allegation is

supported by the fact that all the U.S. members of the Rodriguez-Orjuela Family were amended from the list.

For the above reason the Notices of Blocking are prohibited bills of pains and penalties.

B. Nonresident aliens have standing to challenge Executive Branch international actions in violation of the limitation in the constitution.

"One grand theme runs through all three centuries of American constitutional history. It is the idea of limited government . . . " A.H. Kelly & W.A. Harbison, The American Constitution: Its Origins and Development 6 (4th ed. 1970).[9] This general Constitutional

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[9] This constitutional principal regarding the limitations on the actions of the legislative and executive branch was recently confirmed by the Colombian Courts in *Sea Search Armada vs. President of the Republic of Colombia*, Superior Tribunal Judicial District of Barranquilla, Red. No. 20-166 (1997). In a surreal twist of fate, the undersigned counsel has been responsible for the management of litigation on behalf of a group of several hundred nonresident U.S. citizens, against a retroactive law of the Government of the Republic of Colombia. In direct conflict with the lower U.S. courts holding in instant action, the Courts in Colombia declared that nonresident U.S. citizens had standing to sue the Government for violation of the Constitution. As explained by the Hon. Dan Burton et al., of the U.S. Congress, " .. . this claim against the Republic of Colombia is the largest private claim by American citizens against a foreign state pending in the world."

principal was confirmed as early as *McCulloch v Maryland*, 4 Wheat 316, at 421, 4 L. Ed.579 (1819), when this Court stated,

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adopted to that end, **which are not prohibited**, but consistent with the letter and spirit of the constitution, are constitutional. (Emphasis added)

Thus the limitation on the power of Congress, or the Executive Branch, to legislate or issue "rules of law" contrary to the limitation in Article I, §9, cl. 3, is logically consistent with the very structure of our limited Constitutional system. This is because the limitation of Article I, §9, Cl. 3, of the Constitution, providing that no Bill of Attainder or bill of Pains and Penalties will be passed was not intended as some narrow, technical prohibition as the Executive Branch has repeatedly argued below, but rather as an implementation of the separation of powers doctrine, as a general safeguard against legislative exercise of the judicial function, *U.S. v. Brown*, 85 S.Ct. 1707 at 1711, 1712, 381 U.S. 437, 14 L.Ed.2d 484 (1965).

Regarding the right of nonresident aliens to obtain judicial review of Executive Ranch actions, in *Gutierrez de Martinez v. Lamagno*, 115 S.Ct. 2227 at 2233-2234; 132 L.Ed.2d 375 (1995), this Court confirmed that the Attorney General's "scope of

employment determination," was subject to judicial review because Executive Branch's,

> ...proposed reading would cast Article III judges in the role of petty functionaries, persons required to enter as a court judgement an executive officer's decision, but stripped of the capacity to evaluate independently whether the executive decision is correct. . . .[10]

In short, the United States Government is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. *Reid v. Covert*, 354 U.S. 1 at 5-6, 77 S.Ct. 2222 (1957); *see also* footnote 7, *United States v. Morrison*, S.Ct. 99-5, Decided May 15, 2000.

Regarding the rights of nonresident aliens to the protection of the limitations in our Constitution, in one of the earliest of the *Insular Case*,[11] *Downs v. Bidwell*,

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See also, Friko Corporation and Johnny Daccarett, alleged alter ego of Friko Corp. vs. Commissioner of Internal Revenue, 26 F.3d 1139 (D.C. 1994), confirming the right of a nonresident alien to challenge the IRS issuance of a jeopardy assessment.

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These are a group of cases dealing with the former island territories of the United States, e.g. Hawaii, Puerto Rico and the Phillippines, acquired subsequent to the Spanish-American War.

182 U.S. 244, 21 S.Ct. 770 at 783, 45 L.Ed. 1058 (1901), this Court stated,

> . . .There is a clear distinction between such prohibitions as go to the very root of the power of congress to act at all, irrespective of time or place, . . .
>
> Thus, when the Constitution declares that 'no bill of attainder . . . law shall be passed,' . . . it goes to the competency of Congress to pass a bill *of that description.*

Subsequently, in *Dorr v. United States*, 195 U.S. 138, 24 S.Ct. 808 at 810 (1904), this Court stated,

> ...[W]hat are the limits of [Congress's] power?
>
> To this [we] answer that, in common with all the other legislative powers of Congress, **it finds limits in the express prohibitions on Congress not to do certain things;** that, in the exercise of the legislative power, Congress cannot pass *ex post facto* law or bill of attainder. . . . (Emphasis added)

This Court explained further that,

> ....[T]here may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and **what may be termed artificial rights which are peculiar to our system of justice**. Of the

> former class are the right . . .to personal liberty and individual property; . . . ; to free access to courts of justice, to due process of law, and to an equal protection of the laws; . . . ; and to such other immunities as are indispensable to a free government. **Of the latter class are the rights . . . to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence**. . . . Even if regarded as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty, and property. (Emphasis added) *Downs v. Bidwell*, 21 S.Ct. at 785 (1901). *See also, Hawaii v. Mankichi*, 23 S.Ct. 787 at 791(1902).

In the leading precedent regarding the rights of nonresident aliens, *Verdugo-Urguidez*, 494 U.S. at 270, this Court issued its majority decision consistent with the above analysis. Because the challenges under the Bill of Rights related to rights unique to our system of justice, it rejected a Mexican citizen's challenges to Executive Branch actions internationally in violation of the 4th Amendment to the Constitution. However, the application internationally of the Bill of Rights is not at issue in the instant action. The only issue before the Court—is the application internationally of the limitations and prohibitions in the Constitution. In his concurring opinion Justice Anthony Kennedy, made this on point and significant observation,

> ...Though it must be beyond dispute that persons outside the United States did not assent to the Constitution, that is quite irrelevant to any construction of the powers conferred or the limitations imposed by it . . . . I take it to be correct, as the plurality opinion in *Reid v. Covert* sets forth, that the Government may act only as the Constitution authorizes, **whether the actions in question are foreign or domestic.** *Verdugo-Urguidez*, 494 U.S. at 276-277 (Emphasis added)

Following this Court's holding in *Verdugo-Urguidez, supra.*, the Court of Appeals for the District of Columbia Circuit held in *People's Moiahedin Organization v. Dept. of State*, 182 F.3d 17 (D.C. Cir. 1999), that challenges under the Bill of Rights were not available to a "foreign entity" acting on behalf of a national government. However, their analysis of the provisions of IEEPA, are distinguishable because in the instant action the challenges are raised by nonresident alien individuals, without any foreign government or entity thereof connection.

C. Nonresident aliens without substantial economic connection to the United States have standing to raise the limitations of Article I, § 9, cl. 3 of the Constitution.

In *Griffin v. Illinois*, 351 U.S. 12 at 17, 18, 19, (1956), this Court made it clear that a judicial system which treated individuals with money differently than

it treated individuals without money is defective, since **"[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."** (Emphasis added) *See also, Yick Wo v. Hopkins,* 118 U.S. 356; 6 S.Ct. 1064; 30 L.Ed. 220 (1886).[12]

The new Federal Rules of Civil Procedure, Rule 4(f), provides that service upon an individual in a Foreign Country, ". . . may be effected in a place not within any judicial district of the United States. . . ." However, it recognizes there must be a right to receive notice of the pendency of a law suit and the opportunity to defend. This is consistent with this Court long recognized the right of nonresident aliens to receive due process and equal protection of the laws. See, *Hanson v. Denckla*, 357 U.S. 235 (1958); *McGee v. International Life Insurance Co.,* 355 U.S. 220 (1957); *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950); *Milliken v. Meyer*, 311 U.S. 457 (1940).

Thus it is obvious that nonresident aliens have standing to raise Constitutional protections in proceed-

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Whatever may be the status of wealth distinctions as a *per se* suspect classification there is no doubt that when the classification affects areas characterized as or considered to be fundamental in nature in the structure of our system of justice–equal protection of the laws–then the classifying body bears a substantial and difficult burden in justifying what it has done.

ings in federal court, irrespective of economic wealth, *Bidwell*, 21 S.Ct. at 785.

Thus the lower Courts substantial economic connection test must be rejected, because to affirm the holding that if you are a rich nonresident alien you have standing to raise Constitutional protections, and if you are poor you do not have standing, is counter to the controlling principal of "equal justice for all," and in violation of the provisions of both the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters, 20 U.S.T. 1361; 28 U.S.C.A. (Appendix following Rule 4 FRCvP); and the Inter-American Convention on Letters Rogatory, Senate Treaty Doc. 98-27; 98th Congress, Second Session; 14 Int'l Legal Materials (I.L.M.) 339 (March 1975).

D. The limitation of Article 1, § 9, cl. 3, applies to the Executive Branch acting under delegated authority from Congress.

The Constitution is the only source of power authorizing action by any branch of the Federal government. *Dorr*, 24 S.Ct. at 809.

Pursuant Article I, § 8, Cl. 3 of the Constitution (A-1), the power to regulate international commerce is,

> "...vested in Congress, is complete in itself, may be exercised to its utmost extent, and **acknowl-**

> **edges no limitation other than prescribed by the Constitution**. . . ." *Bidwell*, 21 S.Ct. at 784.

Pursuant to this section Congress delegated authority under IEEPA for OFAC to issue the Notice of Blocking.

The Courts have held that when Congress delegates its authority to the Executive Branch, the limitations in Article I §8, Cl. 3 of the Constitution apply, in short, "[w]hat Congress cannot do directly, it cannot do by delegation." *Rodriguez v. United States Parole Com'n*, 594 F.2d 170 at 173 (7th Cir. 1979); *Prater v. U.S. Parole Com'n*, 802 F.2d 948 at 952(7th 1986); *United States Ex Rel. Foreman v. McCall*, 709 F.2d 852 at 859 (3rd Cir. 1983); *Walmer v. U.S. Dept. of Defense*, 52 F3d 851 at 855 (10th Cir. 1995); Davis, *Administrative Law of the Seventies* § 5.03 at 147 (1976).

In *Dehainaut v. Pena*, 32 F.3rd 1066 at 1071 (7th Cir. 1994), the Seventh Circuit, referring to its holding in *Rodriguez*, 594 F.2d 170 at 174, stated,

> an administrative rule adopted pursuant to Congressionally delegated authority must be viewed as tantamount to a statute for purposes of determining whether it runs afoul of the *ex post facto* clause, a constitutional provision that, like the ban on bills of attainder, protects settled expectations against subsequent shifts on politi-

> cal winds. Having gone this far, it is a conceivable step to also view agency policy interpreting the language of a presidential directive issued pursuant to statutory authority,. . ., as the functional equivalent of a legislative enactment for bill of attainder purposes.. . . (emphasis added)

In summary, when Congress has delegated to the Executive Branch authority to act under the Commerce Clause, Art I, §8, Cl. 3, instead of acting itself, the resulting Executive Branch action, is an extension of a Congressional act, and must comply with Constitutional limitations.[13]

i. OFAC has no "inherent authority" to act in violation of the prohibition against a bill of pains and penalties.

The Supreme Court has stated,

> [W]e can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of Thou shalt nots' which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments. *Reid v. Covert*, 77 S.Ct. at 1226.

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[13]". . . . Under our written Constitution...the limitations on congressional authority is not solely a matter of legislative grace." *United States v. Morrison*, No. 99-5 at 14 (May 15, 2000).

In short, the **prohibitions** of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive. *Thompson v. Utah*, 18 S.Ct. 620 at 621-622, 170 U.S. 343, 42 L.Ed. 1061 (1898).

Even during time of war, this Court has recognized that these **prohibitions** in the Constitution must be observed. *Ex Parte Milligan*, 4 Wallace 2 at 120, 18 L.Ed. 281 (1866); *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304, 57 S.Ct. 216 at 221, 81 L.Ed. 255 (1936).

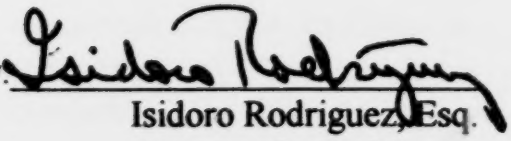
Thus the Executive Branch has no "inherent authority" to issue the challenged Executive Order contrary to the limitations in the Constitution.

CONCLUSION

"There is no liberty, if the power of judging be not separated from the legislative and executive powers." *Montesquieu, quoted in* The Federalist, No. 78 at 521 (Heritage *ed.* 1945). Under our Constitution the Executive Branch, under a delegation from Congress cannot act beyond the limitations placed on it under Article I, §9, Cl.3, irrespective of "time or place." For the foregoing reasons, this Court should issue a writ of certiorari to the Court of Appeals for the District of Columbia Circuit, so to resolve this important federal question.

Respectfully submitted,

The nonresident alien members
of the Rodriguez-Orjuela Family

By: 
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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 8 Cl. 3, provide:

[Congress shall have the Power] To regulate Commerce....

Article I, § 9 Cl. 3, provide:

No Bill of Attainder or *ex post facto* Law shall be passed.

50 U.S.C. § 1701, provide:

Unusual and extraordinary threat; declaration of national emergency; exercise of Presidential authorities

(a)Any authority granted to the President by section 1702 may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.

(b)The authorities granted to the President by section 1702 may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared for purposes of this title and may not be exercised for any other purpose....

50 U.S.C. § 1705, provide:

(a) A civil penalty of not to exceed $10,000 may be imposed on any person who violates any license, order, or regulation issued under this title.

(b) Whoever will fully violates any license, order, or regulation of this title shall, upon conviction, be fined not

more than $50,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both.

21 U.S.C. Sec. 881(a)(6), provide:

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this sub-chapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this sub-chapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by the owner to have been committed or omitted without the knowledge or consent of that owner.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-5217

Carolina Rodriquez Arbelaez, et al.,

Appellants

v.

R. Richard Newcomb, In his official capacity as Director of the Office of Foreign Assets Control, et al.,

Appellees

Appeal from the United States District Court for the District of Colombia
(no. 98-CV02813(LFO))
September Term, 2000

Before: Sentelle, Henderson, and Rogers, *Circuit Judges*

JUDGMENT

This appeal was Considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. The court has determined that the issues presented Occasion no need for a published Opinion. See Fed. R. App. P.36; D.C. Cir. Rule 36(b). It is

ORDERED AND ADJUDGED that the district

court's order filed May 16, 2000 be affirmed. Appellants are foreign nationals without a substantial connection to the United States; they therefore lack standing to bring a challenge under Article I, Section 9, clause 3 of the Constitution of the United States. See United States V. Verdugo Urquidez, 494 U.S. 259, 271(1990) ("[A]liens receive Constitutional protections [only] when they have come within the territory of the United States and developed substantial connections with this country."); People's Moiahedin Organization v. Dept. of State, 182 F.3d 17, 22 (D.C. Cir. 1999) ("A foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.").

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P.41(b); D.C. Cir. Rule 41.

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 98-2813-LFO

CAROLINA RODRIGUEZ ARBELAEZ, et al.,

Plaintiffs,

v.

R. RICHARD NEWCOMB, in his official capacity as Director of the Office of Foreign Assets Control, *et al.*,

Defendants.

MEMORANDUM

The plaintiffs, who are related to and in business with the four principal members of the Colombian Cali Drug Cartel, filed a complaint on November 19, 1998, against defendants Richard Newcomb, Director of the Office of Foreign Assets Control in the United States Department of Treasury, Robert Rubin, Secretary of the Department of Treasury and Madeline Albright, Secretary of State. They seek judicial review and a declaratory judgment against the OFAC declaring unconstitutional the OFAC's October 24, *1995*, March 8, 1996 and April 22. 1997 Notices of Blocking, which list them as Specially Designated Narcotics Traffickers and prevent them from engaging in transactions with property subject to United States jurisdiction. They also seek judicial review and a declaratory judgment against the Bureau of Consular Affairs of the United States Department

of State for the denial of the plaintiffs' visas.

Defendant Newcomb has moved for summary judgment based on Rule 56(c) of the Federal Rules of Civil Procedure; he claims there are no genuine issues of material fact and the defendants are entitled to judgment as a matter of law. Defendant Albright moves to dismiss based on Rule 12(c) of the Federal Rules of Civil Procedure; she claims that this Court lacks subject matter jurisdiction over claims asserted against the Department of State. A hearing was held on December 14, 1999. For the reasons stated herein, an accompanying Order grants the defendants' motions.

I.

At issue is Executive Order 12,98. 60 Fed. Reg. 54,579 *(1995)*. It was promulgated pursuant to the President's authority under the International Emergency Economic Powers Act to prohibit transactions by persons, or involving property, "subject to the jurisdiction of United States" where there exists "an unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat." 50 U.S.C. § 1702(a)(1)(B), 1701(a). On October 21, 1995, the President signed Executive Order 12,978 which declared a "national emergency" based on the finding that "the actions of significant foreign narcotics traffickers centered in Colombia, and the unparalleled violence, corruption, and harm they cause in the United States and abroad, constitute an unusual and extraordinary threat to the national security,

foreign policy, and economy of the United States.. ." Exec. Order No. 12,78,60 Fed. Reg. 54, 579 (1995)

The Order confers authority on the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, to block all property and interests in property subject to the jurisdiction of the United States of (1) "foreign persons determined.. to play a significant role in international narcotics trafficking centered in Columbia", or to "materially assist in or provide financial or technological support for, or goods or services in support of, persons designated in or pursuant to the [O]rder", and (2) "persons determined...to be owned or controlled by, or to act for or on behalf of, persons designated in or pursuant to the [O]rder." Exec. Order No. 12,978, §§ 1(b), 1(c). Individuals and entities designated pursuant to the Order are referred to as "Specially Designated Narcotics Traffickers" (SDNTs). The SDNTs designated on the face of the Order are the four principal figures in the Cali Drug Cartel: Gilberto Rodriguez Orejula, Miguel Angel Rodriguez Orejuela, Helmer Herrera Buitrago, and the late Jose Santacruz Londono.

By the notices in the Federal Register on October 24, 1995, March 8, 1996 and April 22, 1997, the Office of Foreign Assets Control designated the plaintiffs as SDNTs based on their familial relationships with the four named principals in Executive Order 12,78 and their involvement in the principals' companies. As a result of the plaintiffs' SDNTs status, the Bureau of Consular Affairs of the United States Department of State denied non-immigrant visas B1/B2 to the plaintiffs. In addition, the OFAC issued notices of blocking plaintiff's property in the United States.

The plaintiffs are thereby prevented from participating in financial transactions in the United States, for instance they may not have a bank account in or trade in the stock market in the United States, hold United States credit cards or own property here. The Executive Order blocked two bank accounts belonging to one or more of the plaintiffs; at the time of the blocking in 1995, one account held less than $500 that other less than $1,200.

The plaintiffs challenge the Executive Order, the denial of the visas and the economic embargo on constitutional and statutory grounds. First, the plaintiffs claim the Notices of Blocking were arbitrary and capricious, and issued in violation of the Administrative Procedure Act and federal forfeiture law. Second, the plaintiffs argue the Notices of Blocking violated the Fifth Amendment, the Bill of Attainder Clause, the Eight Amendment's prohibition against excessive fines and the separation of powers doctrine. Finally, the plaintiffs, pursuant to 8 U.S.C. § 1202(f), challenge the Secretary of State's decision to deny the plaintiffs' visas. The complaint requests an order declaring that the defendants' actions violated statutory and constitutional law and that the notices of blocking are therefore invalid; it also requests this Court to (1) review the plaintiffs' visa files in camera to determine if the denial of the visas violated the Constitution; (2) award them attorneys fees; and (3) grant other relief that is just and proper.

II.

The defendants move for summary judgment on the plaintiffs' statutory claims based on an assertion that the Notices of Blocking were not arbitrary and capricious. The

plaintiffs, in their opposition neither challenge this argument, nor offer others to support their statutory claims. Therefore, the defendants' motion for summary judgment on the statutory claims shall be treated as conceded, and an accompanying order dismisses them.

III.

The defendants move for summary judgment on the plaintiffs' constitutional claims based on an argument that the United States Constitution does not protect foreign entities without a substantial connection to the United States. The plaintiffs assert that their constitutional claims should survive summary judgment because the following material facts are in dispute:

> 1. In 1992, and in 1997, the Fiscal General de Nacion de Republica de Colombia, and the Court of Appeals of the Republic of Colombia have held that there is no evidence presented that Plaintiffs have done nothing [sic] improper or illegal, nor were involved in money laundering, nor were "frontmen" for the Cali Cartel.
>
> 2. In March, 1999, the Constitutional Supreme Court of the Republic of Colombia held that the Notice of Blocking effectively caused the "civil death" of Plaintiffs without any wrong doing being established and without any judicial trail.
>
> 3. OFAC has publicly sought to punish Plaintiffs by issuing public statements in the Republic of Colombia, which will assure the "civil

death" of Plaintiffs in their own country.

Pl.'s Statement of Material Facts in Dispute (citations omitted).

Our Circuit has instructed that "[a] foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise." People's Majahedin Organization of Iran v. United States Department of State, 182 F. 3d 17, 22 (D.C. Cir. 1999) (*cert filed* Dec. 27, 1999) (N. 99-1070). The plaintiffs argue that this language does not apply to constitutional prohibitions, since these arise from the separation of powers as opposed to fundamental rights. Our Circuit did not, however, so limit its instruction in People's Mojahedin.

The plaintiffs attempt to maintain their constitutional claims by emphasizing that four plaintiffs held two bank accounts in the United States. The Supreme Court has instructed, however, that "aliens receive constitutional protections [only] when they have come within the territory of the United Sates and developed substantial connections with this country." United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) (emphasis added). The two bank accounts at issue combine for a value of less than $2,000. These accounts fail to create a "substantial connection" between the plaintiffs and the United States. Therefore, although the facts cited by the plaintiffs in their statement of material facts in dispute might be in dispute, they are not material to the determination of whether the plaintiffs are protected by the United States Constitution.

Accordingly, an accompanying order grants summary judgment for the government for the constitutional claims.

IV.

The defendants argue that as non-residents living abroad, the plaintiffs lack standing to challenge the Secretary's exercise of discretion in denying visas, and therefore this Court lacks subject matter jurisdiction over these claims. The plaintiffs request that the State Department's motion to dismiss be denied pending a decision on whether the Notices of Blocking are Bills of Illegal Pains and Penalties in violation of the United States Constitution. In the event that this Court finds that the Notices of Blocking violate the Constitution, the plaintiff moves this Court to request copies of State Department records, and review, in camera, the State Department's decision to deny visas to the plaintiffs to see if the denial violated the plaintiffs' constitutional rights.

Unfortunately for the plaintiffs, the controlling authority has ruled that persons situated similarly to plaintiff are entitled to "no constitutional rights under the due process clause or otherwise." People's Mojahedin, supra at 22 (emphasis added). Therefore, an accompanying Order grants the State Department's motion for summary judgment on the decision to deny the plaintiffs visas and denies the plaintiff's motion for this Court to review the State Department's decision regarding the visas.

Date: *May 14, 2000*

/S/
UNITED STATES DISTRICT JUDGE